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This amount is practically the same as found by the learned Subordinate Judge except for the corrections which we have made in regard to two items.

This disposes of all the arguments urged in support of the appeal and the cross-objections.

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The result is that the appeal fails and is dismissed with costs. The cross-objections succeed to the extent of Rs. 130-4-0 only. The decree of the lower court will be modified to this extent that the amount payable to the plaintiffs will be put down at Rs. 22,178-11-0 instead of Rs. 22,048-7-0. In other respects the decree will stand. The cross-objections have practically failed except for an insignificant amount. The plaintiffs will pay the costs of the cross-objections to the appellants.

Appeal dismissed.

APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

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September, 9.

HUSANI BANDI KHANAM, MUSAMMAT (PLAINTIFF-APPELLANT) *v.* GAUHAR BEGAM (DEFENDANT-RESPONDENT).*

Contract—Sale-deed putting the vendee under an obligation for payment of a certain sum due on a pro-note—Holder of pro-note, whether entitled to maintain suit against vendee or his representative-in-interest—Stranger to consideration, if can take advantage of the contract—Indian Trust Act (II of 1882) sections 56 and 69—Indian Contract Act (IX of 1872), section 2(d)—"Consideration", definition of—Indian and English law—Difference between.

Held, that the common law doctrine that no stranger to the consideration can take advantage of a contract although made for his benefit does not exhaust the whole law applicable to this class of cases. Another rule of law which is

*First Civil Appeal No. 55 of 1930, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 24th of February, 1930.

acted upon by the Courts of Equity is that where a sum is payable by A,B for the benefit of C,D., C.D., can claim under the contract as if it had been made with himself.

Where in a sale deed the vendee is clearly laid under the obligation of paying a certain sum of money in discharge of a pro-note, the vendee being a party to the transaction must be taken to have accepted the obligation and the deed creates a trust for the benefit of the holder of the pro-note and the vendee becomes a trustee for the discharge of the liability of the vendor for the debt due under the pro-note and the beneficiary i.e., the holder of the pro-note is entitled to call upon the trustee or his representative-in-interest for the execution of the trust. *Khawaja Muhammad Khan* v. *Husaini Begam* (1). *Touche* v. *Metropolitan Railway Warehousing Company* (2), and *Gandy* v. *Gandy* (3), relied on. *Tweddle* v. *Atkinson* (4), *In re Empress Engineering Company* (5), *Davenport* v. *Bishopp* (6), *Gregory* v. *Williams* (7), *Kidar Nath* v. *Hira Lal* (8), and *Subbu Chetti* v. *Arunachalam Chettiar*, (9), referred to and discussed.

The definition of "consideration" in section 2(*d*) of the Indian Contract Act is wider than the requirement of the English law. *Debnarayan Dutt* v. *Chunilal Ghose*, (10), relied on.

Messrs. *A. P. Sen*, and *S. C. Dass*, for the appellant.

Mr. *Akhlaque Husain*, for the respondent.

HASAN, C. J. and SRIVASTAVA, J. :—This is the plaintiff's appeal from the decree of the Subordinate Judge of Sitapur, dated the 24th of February, 1930. The facts are as follows :—

One Amir Jahan Begam was indebted to Naqi Ali Khan in the sum of Rs. 8,512-12-0 under a pro-note executed by her in favour of Naqi Ali Khan on the 28th of February, 1923. Amir Jahan Begam also held a decree of sale by assignment (exhibit 4) in respect of certain zamindari property on the basis of

(1) (1910) L.R., 37 I.A., 152.
(2) L.R., 6 Ch., App., 671.
(3) (1885) L.R., 30 Ch., D., 57.
(4) (1861) 1 B.&S., 393.
(5) (1880) L.R., 16 Ch., D., 125.
(6) 2 Y.&C., Ch., 451.
(7) 3 Mer., 582.
(8) (1902) 5 O.C., 235.
(9) (1919) I.L.R., 53 Mad., 270.
(10) (1913) I.L.R., 41 Calc., 137.

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a deed of mortgage, dated the 12th of June, 1908. The decree was passed by the court of the Subordinate Judge of Sitapur on the 12th of June, 1918 (exhibit 3). On the 4th of February, 1926, she assigned the decree just now mentioned in favour of one Akhtar Begam for a consideration of Rs. 10,000 (exhibit 1). In the deed of assignment the assignee was laid under the obligation of satisfying the debt due under the pro-note of the 28th of February, 1923, in part consideration of the assignment. On the 9th of June, 1926, Naqi Ali Khan sold his rights under the pro-note of the 28th of February, 1923, to the plaintiff by means of a deed of that date for a sum of Rs. 7,000 (exhibit 2). Akhtar Begam has since died and on her death the name of Gauhar Begam her daughter and representative-in-interest was brought on the decree, dated the 12th of June, 1918, already referred to. On the 12th of August, 1929, Gauhar Begam obtained a personal decree for a sum of Rs. 30,000 against the judgment-debtors of the decree of the 12th of June, 1918, in place of the decree for sale.

In the suit, out of which this appeal arises, the plaintiff seeks to recover the debt due under the pro-note of the 28th of February, 1923. Gauhar Begam is the 9th defendant in the suit. The learned Subordinate Judge decreed the plaintiff's claim as against all the defendants except Gauhar Begam and dismissed it as against her. The later part of the decree is challenged in appeal. The ground of the learned Subordinate Judge's decision is two-fold (1) that as Naqi Ali Khan was no party to the contract of sale of the 4th of February, 1926, the plaintiff has no right to maintain the suit against Gauhar Begam and (2) that the consideration which moved from Amir Jahan Begam has not yet been realized by Gauhar Begam inasmuch as she has obtained only a simple money decree against the judgment-debtors of the decree which was the subject-matter of sale.

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We are of opinion that the appeal succeeds. The common law doctrine "that no stranger to the consideration can take advantage of a contract although made for his benefit" was laid down in the case of *Tweddle* v. *Atkinson* (1). It was stated in the words quoted above by WIGHTMAN, J. CROMPTON, J., said "that the plaintiff cannot succeed unless this is an exception to the modern and well-established doctrine of the action of assumpsit." He further said "that the promisee cannot bring an action unless the consideration for the promise moved from him." In the judgment of BLACKBURN, J., occurs the following :— "Mr. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made." On a careful consideration of the judgments of the learned Judges who decided the case of *Tweddle* v. *Atkinson* (1) it is clear to our minds that the plaintiff's action in that case was founded on a promise but had failed for the reason that no consideration for the promise moved from the plaintiff. The decision would therefore be applicable to cases in India if it were necessary in this country that the consideration for a contract must move from the plaintiff suing on the contract. As pointed out by JENKINS, C.J., in the case of *Debnarayan Dutt* v. *Chunilal Ghose* (2), "we have a definition of consideration which is wider than the requirement of the English law-section 2(*d*) of the Contract Act." The doctrine enunciated in *Tweddle* v. *Atkinson* (1) does not exhaust the whole law applicable to this class of cases. This was pointed out by their Lordships of the Judicial Committee in the case of *Khwaja Muhammad Khan* v. *Husaini Begam* (3). Another rule of law is the rule acted upon by the courts of equity. This rule was stated by Lord HATHERLEY,

(1) (1861) 1 B.&S., 393 S.C. 121 E.R., 762.

(2) (1913) I.L.R., 41 Calc., 137.

(3) (1910) L.R., 37 I.A., 152.

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L.C., in *Touche* v. *Metropolitan Railway Warehousing Company* (1) which was referred to by JENKINS, C.J., in the case just now mentioned. In that case one Walker and the Metropolitan Railway Warehousing Company had entered into an arrangement by means of a deed. Walker was to receive a certain sum of money from the company for the benefit of the plaintiffs. The company not having handed over that sum of money to Walker the plaintiff sued the company. LORD HATHERLEY said: "But I think I am justified in holding that the plaintiffs have a right to come here and obtain the benefit of the arrangement entered into between Walker and the company. *Davenport* v. *Bishopp* (2) and *Gregory* v. *Williams* (3) are authorities to that effect." At the end of the judgment his Lordship said: "The case comes within the authority that where a sum is payable by *A.B.* for the benefit of *C. D.*, *C. D.* can claim under the contract as if it had been made with himself. It is possible that Walker may, as he states in his answer, not be under any personal liability to the plaintiffs: but I think that, on the evidence, the plaintiffs were to be paid when Walker got the money, and they knew that by the articles of the company he was to be paid." The last part of the above quotation answers the second ground of the learned Subordinate Judge's decision also. Gauhar Begam has already obtained a decree for the sum of Rs. 30,000 and she can be made liable for the plaintiff's claim only to the extent of the assets she may receive or might have received from Akhtar Begam. She is certainly not personally liable.

In *Gandy* v. *Gandy* (4), COTTON, L.J., stated the same rule in the following words:—"If the contract, although in form it is with *A*, is intended to secure a

(1) L.R., 6 Ch., App., 671.
(2) 2 Y. & C., Ch., 451; 1 Ph., 698.
(3) 3 Mer., 582.
(4) (1885) L.R., 30 Ch., D., 57 (67).

benefit to *B* so that *B* is entitled to say he has a beneficial right as *cestui que trust* under that contract; then *B* would, in a court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated." COTTON, L.J., also considered the decision of Lord HATHERLEY in the case of *Touche* v. *Metropolitan Railway Warehousing Company*, already referred to and distinguished it on the facts of the case before him. In *In re Empress Engineering Company* (1) JESSEL, M.R., dealing with Touche's case said in the course of the argument:—"In that case the Lord Chancellor finds, as a fact, that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones and Pride are *cestuis que trust* that alters the case. It appears to me that they are not. The promoters were liable to Jones and Pride, who are simply their creditors. *A* being liable to *B*, *C* agrees with *A* to pay *B*. That does not make *B* a *cestui que trust*."

In the deed of sale, dated the 4th of February, 1926, the vendee, that is Akhtar Begam, is clearly laid under the obligation of paying the sum of Rs. 8,512-12-0 in discharge of the pro-note, dated the 28th of February, 1923. She being a party to this transaction must be taken to have accepted the obligation. She is therefore a trustee for the discharge of the liability of Amir Jahan Begam for the debt due under the pro-note and the holder of the pro-note is the beneficiary. This being our interpretation of the deed of the 4th of February, 1926, it follows that the creditor, that is the beneficiary now represented by the plaintiff, is entitled to call upon the trustee or her representative-in-interest, Gauhar Bagam, for the execution of the trust. Section 56 of the Indian Trusts Act, 1882, enacts that "every beneficiary is entitled to have the intention of the author

(1) (1880) L.R., 16 Ch., D., 125.

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of the trust specifically executed to the extent of the beneficiary's interest." Section 69 of the same Act is as follows:—"Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer."

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In support of his decision the learned Subordinate Judge has referred to a decision of the late court of the Judicial Commissioner of Oudh in *Kidar Nath* v. *Hira Lal* (1). The judgment in that case clearly proceeded on the sole ground that a person not a party to a contract is not entitled to enforce it. This is merely a statement of the general rule of the common law and the application of the rule of law on which we rely in the present case does not appear to have either arisen or considered in that case.

On behalf of the respondent we were also referred to a recent Full Bench decision of the High Court at Madras in *Subbu Chetti* v. *Arunachalam Chettiar* (2). The substance of the judgments delivered by the learned Judges of the Full Bench is correctly, if we may say so, reproduced in the head-note of the report and it is as follows:—

"Where on a contract between *A* and *B*, *B* agrees to pay a sum of money to *C* and no more circumstances appear, *C* being a stranger to the contract, cannot sue *B* for the money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e.g., (*a*) where *B* afterwards agrees with *C* to pay him direct or becomes estopped from denying his liability "to pay him personally; (*b*) where the contract between *A* and *B* creates a trust in favour of *C*; (*c*) where the contract charges the money to be paid out of some immovable

(1) (1902) 5 O.C., 233. (2) (1919) I.L.R., 53 Mad., 270.

property or (*d*) where it is due to *C* under a marriage settlement, partition or other family arrangement." The case before us falls within the exception (*b*).

The pro-note of the 28th of February, 1923, has not been produced in the case. On the evidence the learned Subordinate Judge held that the loss of the aforementioned pro-note was established. He therefore allowed secondary evidence to be produced in proof of the pro-note. On behalf of the respondent it was contended before us that the learned Subordinate Judge's finding as to the loss of the pro-note was not correct. We reject this contention. It is not the respondent's case that the debt due under the pro-note had ever been repaid by anybody. The plaintiff therefore had no motive in putting forward the case of the loss of the pro-note unless it were a true case. The evidence with which the learned Subordinate Judge was satisfied is that on the transfer of the pro-note by Naqi Ali Khan to the plaintiff the pro-note in question was handed over by Naqi Ali Khan to the plaintiff's agent, Sardar Husain, at the registration office. Sardar Husain lost it. He was not produced as a witness because he had left the plaintiff's service. Witnesses Barhmadin and Ahmad Shah support the case of the loss of the pro-note. We have also before us the police report (exhibit 1/P.W. 1) which shows that on the 11th of June, 1926, Sardar Husain reported at the police-station of Misrikh that he had lost the pro-note of the 28th of February, 1923.

The plaintiff has claimed a sum of Rs. 12,000 in this suit. This comprises the principal and interest at the rate of 2 per cent. per mensem. She has relinquished Rs. 113-5-4 out of the total amount of Rs. 12,113-5-4 due on the pro-note. We are of opinion that the plaintiff cannot get a decree for more than the sum of Rs. 8,512-12-0 as against the respondent, Gauhar Begam. It was for this amount of money

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that the obligation to repay was imposed upon Akhtar Begam and accepted by her.

We accordingly allow the appeal and in addition to the decree passed by the lower court against the other defendants to the suit we pass a decree in favour of the plaintiff against Gauhar Begam also for the sum of Rs. 8,512-12-0 with interest at 6 per cent. per annum from the date of the suit to the date of realization. The plaintiff will also be entitled to her costs in both the courts in proportion to the sum of money hereby decreed. The decree will be executable only against the assets of Akhtar Begam which might have come or may come into the hands of Gauhar Begam.

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Appeal allowed.

APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

1931 *September*, 18.

SHEIKH RAMZAN AND ANOTHER (PLAINTIFF-APPELLANTS) *v.* MUSAMMAT RAHMANI AND OTHERS (DEFENDANTS-RESPONDENTS).*

Musalman Waqf Validating Act (VI of 1913,) sections 2 and 3—Annual profits of waqf *property after deducting expenses specified to be spent by* mutawallis *for maintenance of themselves and their children—Waqf, if valid—Use of word* waqf *if enough to create dedication—Proviso to section 3 of waqf Validating Act, 1913, object of*—Waqfnama *containing the expression "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul"*—Waqf, *if satisfies the requirements of proviso to section 3—Non-specification in the deed of* waqf *of religious and charitable objects, if renders dedication vague.*

Where the annual profits of the *waqf* properties are Rs. 700 a year and after deducting the expenses on charitable

*First Civil Appeal No. 115 of 1930, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Partabgarh, dated the 25th of August, 1930.